ISSUE 40

PATTON & RYAN LLC

Things are busy at Patton & Ryan and getting busier. We continue to defend cases across the nation with the same professionalism and vigor that we have always applied. However, there is no question that the amounts paid in settlements, or awarded by jury verdicts, are rapidly rising. Even valuations given by judges and mediators in the course of settlement negotiations are escalating. By their own admission, the cause of this appears to be jurors who are generally more sympathetic to injured plaintiffs now than in the recent past.

Commentators have suggested that this rise in verdict and settlement values is the result of changing perceptions of litigants, in the wake of the COVID-19 pandemic. While that may be true, we have also found that personal injury lawyers have stepped up their use of underhanded tactics; it appears to us that the plaintiff's bar has taken note of the tendency of juries to award bigger amounts, and therefore has become as greedy as we have ever seen them.

You need to fight fire with fire. You need to have attorneys who can recognize the potential for a "nuclear verdict" early on the litigation, who are skilled settlement and mediation negotiators, and who are highly experienced in litigating cases efficiently, all the way through to judgment. Patton & Ryan is home to such attorneys and is well-equipped to defend any case. We would be very happy to talk with you about any such case that you might be facing, and to give you the best assessment that we can, so that the legal issues you are facing are addressed promptly and effectively. We remain committed to our mission of delivering excellent performance and using all of our efforts to keep you and your insureds off of the list of nuclear verdicts.

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PROXIMATE CAUSE REDEFINED

A committee of the Illinois Supreme Court recently redefined proximate cause, through an amended pattern jury instruction. That instruction -- *Illinois Pattern Jury Instructions - Civil* §15.01 – reads as follows:

> When I use the expression "proximate cause," I mean a cause that, in the natural or ordinary course of events, produced the plaintiff's injury. It need not be the only cause, nor the last or nearest cause. It is sufficient if it combines with another cause resulting in the injury.
>
> If you decide that the defendant was negligent and that his negligence was a proximate cause of injury to the plaintiff, it is not a defense that something or someone else may also have been a cause of the injury. However, if you decide that the defendant's conduct was not a proximate cause of the plaintiff's injury, then your verdict should be for the defendant.

At first blush, this definition does not appear to be the source of any sort of controversy. Yet this revision, which combined three separate instructions on the subject into one, does not refer to a person or entity being the "*sole* proximate cause" of an injury.

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Proximate Cause continued...

The change in the instruction was brought about by a decision in *Douglas v. Arlington Park Racecourse LLC*, 2018 IL App (1st) 162962. The committee comments on IPI 15.01 point out that *Douglas* (*id*. at ¶36) held that "the sole proximate cause theory is simply one way a defendant argues that a plaintiff failed to carry its burden of proof on proximate cause – specifically, by arguing that the negligence of another person or entity, not a party to the lawsuit, was the only proximate cause of the plaintiff's injuries." Subsequently, *Douglas* (*id.* at ¶58) found that "[the] paramount attribute of the word 'sole' is its exclusivity, not its number. Used in the context of 'sole proximate cause,' the point is that the group of nonparties are exclusive in the sense that their collective negligence was 100% of the plaintiff's injury, and the party-defendant's contribution to the injury was zero. Whether that group consists of 11 nonparties… 2 nonparties… or only a single nonparty is just a detail. Whether one of those nonparties is 100% responsible, or whether the 100% is divvied up among several nonparties, likewise makes no difference."

A year later, a decision in *Doe v. Alexian Brothers Behavioral Health Hospital*, 2019 IL App (1st) 180955, expressly rejected the reasoning and holdings of *Douglas*. *Doe* (*id*. at ¶33) agreed with the dissenting opinion issued in *Douglas* and found that "'sole proximate cause' cannot apply to more than one party," but further held that, "[as] highlighted by… *Douglas*, without a clear definition, 'sole proximate cause' can be a confusing term to a jury." *Doe* accordingly ordered a new trial, given that the instructions given, combined with a special interrogatory put to the jury on the subject, caused confusion among jurors.

The committee apparently took that finding to heart when drafting IPI 15.01; per its commentary, the revised instruction was designed "to avoid unnecessary confusion and consternation." It remains to be seen whether IPI 15.01 accomplishes this in practice; however, litigants and other stakeholders should be aware of the elimination of "sole proximate cause" instructions in Illinois, in favor of the revised IPI 15.01.

Recent Successes

- John Patton settled an Indiana suit where a union steelworker suffered burns at a steel mill. The parties agreed to settle for $1,800,000, where plaintiffs initially sought $7,000,000 at the beginning of mediation.

- John Patton also settled a case in Cook County where the claimant was rear-ended by a school bus. The case settled for $1,100,000, despite an initial demand by the plaintiff for $3,750,000.

- Tom Soule won summary judgment for a police department facing a wrongful death claim. The case involved a drunk driver who struck and killed a young woman; the driver was released from the custody of the police department eight hours before the accident. The Court held that a provision of the Tort Immunity Act (745 ILCS 10/1-101 et seq.) barred the plaintiff from seeking recovery against the police department.

- Dave Ryan settled a suit in DuPage County on the eve of trial, in a case where a school bus struck and injured another driver. The claimant sought $750,000; however, the case settled for $385,000, which was only marginally more than the combined medical specials and lost wages sought.

- John Patton won dismissal of a claim in Cook County relating to allegations that an insurer conducted surveillance of a claimant's wedding. The Court held that the claimant did not have standing to allege a trespass (as they did not own or lease the property where the wedding was held), and found that the insurer did not have sole control over the company contracted to perform the surveillance, while the contracted investigator was not intruding on the claimant's privacy, as the wedding was not truly private given that guests, venue staff and others were able to come and take pictures of the event.

CONSTITUTIONALITY OF PRE-JUDGMENT INTEREST IN ILLINOIS

A recent amendment to 735 ILCS 5/2-1303, which provided that prejudgment interest would be permitted in personal injury and wrongful death cases in Illinois, has been the topic of much discussion about its constitutionality since its enactment in May 2021. Unfortunately, that discussion has been limited to circuit court rulings, which means that there is no clarity yet on the issue through a ruling from higher courts.

Initially, the amendment to 735 ILCS 5/2-1303 called for the allowance of prejudgment interest at an annual rate of nine percent. However, due to pressure from several interests, including significant resistance from hospitals and healthcare providers, Governor Pritzker vetoed the proposed change; while he was generally supportive of allowing for prejudgment interest, he found the proposed change could drive up costs for health care. Gov. Pritzker also noted that other states limited prejudgment interest to economic damages and excluded them for future or punitive damages.

In response to these criticisms, the Legislature passed a new version of the amendment, which Gov. Pritzker ultimately signed into law on May 28, 2021, and which is codified at 735 ILCS 5/2-1303(c). This version provided for prejudgment interest in personal injury and wrongful death cases at a rate of six percent, which does not apply to punitive damages, sanctions, attorney's fees and costs, and with a five-year limit on the period in which interest would accrue. Other limitations apply to the amended statute as well, including a provision that allows prejudgment interest to be avoided "if the judgment is equal to or less than the amount of the highest written settlement offer" made within a year of the filing of the statute; further, the state, and local governmental units, would not have prejudgment interest applied against them in any case.

On May 27, 2022, the Hon. Marcia Maras of the Circuit Court of Cook County held that 735 ILCS 5/2-1303(c) was unconstitutional. In *Hyland v. Advocate Health & Hospitals Corp.* (No. 2017 L 3541 (Cook Co. Cir. Ct.)), Judge Maras held that §1303(c) violated litigants' right to a trial by jury, in that jurors can weigh damages for themselves, and incorporate damages for injuries occurring before judgment regularly. She then held that the amendment constituted "special legislation" which confers a benefit on one group while denying it to those similarly situated, without being narrowly tailored to meet a compelling interest.

As a circuit court ruling, Judge Maras's opinion is not binding on other Illinois state courts. And other judges in Illinois have ruled contrary to her conclusion. For instance, the Hon. Maura Slattery Boyle gave prejudgment interest to the plaintiff in *Ahearn v. Heliotis* (No. 2017 L 3552 (Cook Co. Cir. Ct.)), finding that the statute at issue was constitutional. Judge Slattery Boyle, relying upon *Tri-G Inc. v. Burke Bosselman & Weaver*, 222 Ill.2d 218, 256 (Ill. 2006), specifically found that interest is distinguishable from damages; whereas damages are within the province of a jury to decide, interest on those damages is a statutory remedy, and statutes governing how interest accrues are not within a jury's decision-making power. The Court also found that the enactment of §1303(c) was not "special legislation," in that the classification that it creates (between personal injury and wrongful death cases on one side, and other tort actions on the other) was "based on reasonable differences in kind or situation… [and was] sufficiently related to the evil to be obviated by the statute," in line with *Best v. Taylor Machine Works*, 179 Ill.2d 367, 394 (Ill. 1997). Other judges have entered similar rulings, across the state, which uphold the amendment.

To date, no appellate courts have weighed in on the subject. In fact, *Hyland* only recently resolved with a judgment in favor of the defendants after trial; the case currently remains before the trial court on post-trial motions. However, at least two cases relating to this issue (*Cotton v. Coccaro*, No. 1-22-0788 (1st Dist.) and *Estate of Smith v. Advocate Health & Hospitals Corp.*, No. 4-22-0403 (4th Dist.)) have been appealed. We will continue to monitor these cases, and others, and will give our best advice to clients upon the entry of any precedential rulings.

Partner Spotlight

TODD PORTER - PARTNER

Todd Porter brings over three decades of experience to the table when representing clients and insureds. His prior work defending against claims of medical and nursing malpractice has been successfully applied to the broad range of claims that Patton & Ryan clients face. Recently, Todd efficiently and effectively handled a case involving a plaintiff who suffered catastrophic injuries and death, allegedly as a result of the defendant's negligence. Notwithstanding a difficult and plaintiff-sympathetic fact pattern, Todd and the Patton & Ryan team were able to negotiate a settlement favorable to defendant at mediation, at less than ten percent of the plaintiff's eight-figure settlement demand.

PATTON & RYAN'S SUCCESSFUL DISMISSAL IN ILLINOIS FEDERAL COURT

Illinois is known as a plaintiff-friendly venue. Patton & Ryan knows that any opportunity to dismiss a case due to lack of personal jurisdiction in Illinois is a benefit to the client. In particular, when a case is pending in federal court, it is critical to identify early on the potential to seek dismissal.

Patton & Ryan successfully won a motion to dismiss its Indiana-based client from an Illinois federal court case. The client, a valve manufacturer, was sued for over $900,000 in property damage allegedly arising out of a flooding event in a high-rise apartment building in Illinois, where its valve was installed as a component of an air conditioning unit. Patton & Ryan immediately identified the lack of jurisdiction in Illinois and moved to dismiss.

The Plaintiff fought the motion by seeking written and oral discovery. In the midst of the pandemic, Patton & Ryan timely responded to written discovery and extensively prepared and produced the client's President and CEO for his deposition.

After reviewing the briefs and the evidence, the Illinois federal court granted Patton & Ryan's motion and dismissed its client from the case due to lack of personal jurisdiction in Illinois. The granting of the motion was a resounding success as the federal judge rejected every argument that the plaintiff made.

Procedure matters, and Patton & Ryan is prepared use procedural rules to gain an advantage for its clients.

Areas of Practice

- Appellate Litigation
- Attorney Malpractice Defense
- Catastrophic Loss
- Civil Litigation and Insurance Defense
- Commercial Litigation
- Construction Defect
- Employer Liability
- Insurance Coverage and
- Bad Faith Litigation
- Labor & Employment Law
- Mass Torts
- Medical Malpractice and Medical
- Device Defense Litigation
- Municipal Entity Defense
- Product Liability
- Professional Liability
- Transportation & Trucking Litigation

ILLINOIS

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